Supreme Court, U.S.
FILED

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Case No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

CONSTANCE W. MURRAY,
Petitioner,

v.

JAMES B. MCINTYRE,
MCINTYRE, HAVILAND & JORDAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR WRIT OF CERTIORARI

Constance W. Murray
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21 pp

QUESTION PRESENTED FOR REVIEW

Whether a substantial fact issue existed as to when the petitioner had reason to know of legal malpractice, thus precluding summary judgment on the grounds that the legal malpractice action was time barred by the statute of limitations, and whether such summary judgment thereby violated principles of due process.

LIST OF ALL PARTIES

The parties in the Supreme Court of Appeals of West Virginia were Constance W. Murray, Petitioner, and Plaintiff below, and James B. McIntyre, McIntyre, Haviland & Jordan, Respondents, and Defendants below.

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REFERENCE TO OPINIONS BELOW

The decision of the Supreme Court of Appeals of West Virginia is set out in page A1 of the Appendix. The order entered in the Circuit Court of Kanawha County, West Virginia by Judge Paul Zakaib, Jr. is set out in pages A2 and A3 of the Appendix.

JURISDICTION

The decision of the Supreme Court of Appeals of West Virginia was filed on November 16, 1994. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, Amendment XIV, § 1, Citizenship Rights Not to be Abridged by States, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Factual Background

In July, 1985, petitioner, Constance W. Murray, retained respondent, James B. McIntyre, to represent her in a divorce action after 19 years of marriage to William C. Murray, a practicing dentist. (Civil Action No. 85-C-627, Circuit Court of Kanawha County, West Virginia). At that time, Constance W.

Murray and William C. Murray were the parents of three minor daughters and possessed rather substantial marital assets.

Pursuant to the divorce action, the circuit court appointed a special commissioner to conduct hearings and to make a recommendation. The parties and their attorneys appeared before the Special Commissioner Allen Masinter in January, 1986, to determine temporary relief. The children had been residing with their mother; Dr. Murray had been derelict in providing financial assistance.

The special commissioner awarded temporary custody of the children to Constance Murray and ordered Dr. Murray to pay support pendente lite of $1,500.00 per month. Attorney James B. McIntyre, the respondent herein, who was Mrs. Murray's attorney, prepared an order reflecting this ruling, but the order was never entered. Unbeknownst to Constance Murray, until she obtained her file from Attorney McIntyre in June, 1991, was a secretly contrived second temporary order made nunc pro tunc as of December, 1988, also never entered.

During the course of the divorce action, temporary support arrearage of over $15,000 accumulated. Because the orders were never entered by Attorney McIntyre, Mrs. Murray was denied the benefit of that money, thereby causing undue family hardship.

On August 25, 1986, the special commissioner issued a recommendation in the Murray divorce action. He based his recommendation on the testimony of the parties and the argument of counsel. Both parties filed exceptions and objections to the special commissioner's recommendation. Defendant McIntyre was late in his filing.

In December, 1988, Judge Margaret Workman of the Circuit Court of Kanawha County conducted hearings on the exceptions and objections. At the conclusion of the hearings, Judge Workman, who had been recently appointed to the Supreme Court of Appeals of West Virginia, issued a ruling which was to be reduced to an order and entered by her successor. No decree was entered, however, as the parties attempted to reconcile their differences.

Reconciliation failed and in the latter part of 1989, Attorney McIntyre informed Mrs. Murray that he would no longer file any exceptions in her behalf and that she would have to seek another attorney to do so. Subsequently, the petitioner retained Attorney Sharon Mullens to assist.[1]

Circuit Court Judge Tod Kaufman, who had taken now Justice Workman's position, entered a Final Order on September 24, 1990. Both of Mrs. Murray's attorneys -- Mullens and McIntyre -- endorsed this order as being "Counsel for Plaintiff." Attorney Mullens noted exceptions to this Final Order.

Attorney Mullens filed a petition for appeal in Constance Murray's behalf to the Supreme Court of Appeals of West Virginia. (Murray v. Murray, No. 910202) That petition, among other things, cited prejudicial error committed by the Kanawha County Circuit Court.

On March 4, 1991, Dr. Murray's attorneys responded to Constance Murray's petition. Dr. Murray's Response Brief repeatedly pointed out the failures of Constance Murray's attorney, James B. McIntyre, to conduct adequate discovery regarding the marital assets. Dr. Murray argued that he should not be held accountable for the opposing attorney's failure to conduct adequate discovery, stating as follows:

> The record herein contains no motions by plaintiff for discovery or other disclosure of assets; no Order of the Court requiring such disclosure; and, no subpoenas duces tecum of the plaintiff (Mrs. Murray) for production of documents relating to assets and/or liabilities. Further, the transcript contains no objections by plaintiff to

[1] Attorney McIntyre stated that termination of services occurred. However, it is arguable whether such termination of services occurred given the fact that Mrs. Murray never dismissed him; correspondence by the opposing attorney was addressed to Mr. McIntyre as her attorney; there was no documentation in the circuit court file relieving Mr. McIntyre of his services; and he was present and signed the final divorce decree as Mrs. Murray's attorney. Notwithstanding this debate, the circuit court adopted the "termination rule" as opposed to the long-standing "discovery rule" in dismissing this case.

> testimony of defendant regarding assets, liabilities and values. Plaintiff did not call any appraisers or other experts to testify regarding the economic issues in the case.
>
> "Response of Dr. William C. Murray to Petition for Appeal", p. 3.

The Supreme Court of Appeals of West Virginia apparently agreed with Dr. Murray's argument, as it denied Constance Murray's petition following oral argument on March 13, 1991. Mrs. Murray's pro se petition for rehearing was also rejected a month later.

On September 24, 1992, two years from the date of her divorce, Constance Murray filed this legal malpractice action against her former attorney, James B. McIntyre, and his law firm for negligent representation of Mrs. Murray during the divorce proceedings. This action alleged that Defendant McIntyre had been negligent in failing to conduct adequate discovery of marital assets, costing her at least $165,000. Mrs. Murray also alleged that Defendant McIntyre's negligence had cost her temporary support arrearages, as described earlier herein.

Discovery ensued with Mrs. Murray cooperating fully; however, Defendant McIntyre's attorneys aggressively and repeatedly thwarted Mrs. Murray's efforts to obtain discovery. While Mrs. Murray and her former husband submitted to depositions, Defendant McIntyre's lawyers successfully barred the taking of his deposition.

In September, 1993, Defendant McIntyre moved for summary judgment, seeking to dismiss all of Constance Murray's claims against him. Defendant McIntyre claimed that this action was barred by a two-year statute of limitations since he had ceased to represent Mrs. Murray well in advance of two years before she filed this lawsuit. Defendant McIntyre also argued that the doctrine of collateral estoppel barred his former client's cause of action against him.

Mrs. Murray replied that the "discovery rule" regarding the statute of limitations should apply. In her response to Defendant McIntyre's motion, Mrs. Murray stated she had first learned of Defendant McIntyre's discovery shortcomings when she commenced her pro se rehearing appeal to the Supreme Court of Appeals of West Virginia in March, 1991.

After obtaining her file from Defendant McIntyre on June 25, 1991, she became further convinced that her attorney had been negligent in providing legal services to her.

Mrs. Murray argued that the dates of her discovery of the legal malpractice of Defendant McIntyre fell well within the two-year period of her September, 1992 filing of this civil action. Regarding the argument of Defendant McIntyre that the doctrine of collateral estoppel barred her claim, Mrs. Murray replied that the data on assets and debts had never been fully developed during the divorce; thus it was impossible for the doctrine of collateral estoppel to apply. The deliberations in the underlying divorce never addressed Defendant McIntyre's negligent discovery efforts.

On November 17, 1993, Paul Zakaib, Judge of the Circuit Court of Kanawha County, presided over Defendant McIntyre's motion for summary judgment. Judge Zakaib granted Defendant's motion exclusively on the grounds of statute of limitations. (See Appendix.)

B. When Federal Question Was Raised

The federal question sought to be reviewed was first raised by Constance W. Murray in "Plaintiff's Response to Defendant's Memorandum of Law in Support of His Motion for Summary Judgment," and said response was included in the record that was submitted by Mrs. Murray to the Supreme Court of Appeals of West Virginia pursuant to her filing of the Petition For Appeal.

Mrs. Murray provided in the Conclusion of her response as follows:

> Summary judgment does not apply. A genuine issue of fact exists wherever there is a conflict as to the evidence. Considerable monetary dam-

age has been done. Collateral estoppel does not apply. Plaintiff did not have the opportunity to litigate defendant's negligence. Statute of limitations does not apply. Plaintiff did not discover defendant's negligence until March and June of 1991, well within the two year limitation. Tort action is based on defendant's failure to meet the standard of care and fiduciary duties. Defendant also had an oral contract implying he would exercise ordinary skills and services in rendering professional services. **A party should not be denied the opportunity of the full due process to which they are entitled.** Plaintiff pleads that summary judgment not be granted.

"Plaintiff's Response To Defendant's Memorandum Of Law In Support Of His Motion For Summary Judgment" at p. 7. (emphasis added)

Therefore, the federal question at issue herein was timely and properly raised so as to give the Supreme Court of the United States jurisdiction to review the judgment of the Supreme Court of Appeals of West Virginia on a writ of certiorari.

REASONS FOR GRANTING THE WRIT

A SUBSTANTIAL FACT ISSUE EXISTED AS TO WHEN THE PETITIONER HAD REASON TO KNOW OF LEGAL MALPRACTICE, THUS PRECLUDING SUMMARY JUDGMENT ON THE GROUNDS THAT THE ACTION WAS TIME BARRED BY THE STATUTE OF LIMITATIONS, IN VIOLATION OF PRINCIPLES OF DUE PROCESS.

The Circuit Court of Kanawha County granted summary judgment in favor of the Defendant James B. McIntyre on the

grounds that Mrs. Murray's legal malpractice claims were barred by the statute of limitations. The lower court reasoned that as Defendant McIntyre's services to his client had apparently ended in April, 1990, and action filed against him in September, 1992 went beyond the two-year period for a legal malpractice case.

In making this ruling, the circuit court apparently and improperly adopted the "termination rule." Zimmie v. Chafee, Halter, and Griswold, 538 N.E.2d 398 at 401 (Ohio, 1989). However, West Virginia has made it abundantly clear that it will apply the "discovery rule" to legal malpractice actions. The discovery rule was first applied in West Virginia to underground mining encroachment. Petrelli v. West Virginia--Pittsburgh Coal Co., 104 S.E. 103 (W.Va. 1920). It was later applied to a sponge left in the abdomen by defendant physician in Morgan v. Grace Hosp., Inc., 144 S.E.2d 156 (W.Va. 1965), and then to attorney malpractice in Family Savings & Loan, Inc. v. Ciccarello, 207 S.E.2d 157 (W.Va. 1974). See Vincent Paul Cardi, Time Limitations On Attorney Malpractice Claims, 95 W.Va. L. Rev. 913 (1993).

The Circuit Court of Kanawha County clearly erred in applying the termination rule and therefore improperly granted summary judgment in favor of Defendant McIntyre. Some states have special statutes of limitations for legal malpractice, or a general professional malpractice statute which is held by courts to cover attorney malpractice. West Virginia has neither. Therefore, in West Virginia, malpractice actions against attorneys are covered by the general statutes of limitations covering the general causes of actions available to claimants injured by their attorneys. 95 W.Va.L.Rev. at 921-922. The West Virginia Supreme Court has ensured that the statute of limitations will not run before the claimant has reason to know of the injury. Id. at 941.

By turning down Mrs. Murray's Petition for Appeal -- and thus allowing the lower court's granting of summary judgment in favor of Defendant McIntyre to stand -- the state

Supreme Court has inexplicably ignored its own well-established precedent with regard to the discovery rule, and thus is clearly wrong.

In opting for the termination rule to dismiss Mrs. Murray's case, both the circuit court and the state Supreme Court failed to examine her assertion that she first "learned" or "discovered" the injury in March, 1991, well within the statutory two-year period for filing of this lawsuit. In dismissing Mrs. Murray's action, the circuit court simply took the date of Defendant McIntyre's alleged termination of services, April, 1990, added two years, and found the lawsuit had been filed after that date.

In Ciccarello, supra, the state Supreme Court provided as follows:

> 2. Where, in a civil action against an attorney, the plaintiff alleges that he suffered damages by reason of the defendant's negligence in certifying as good and marketable the title to certain real property, the period of the applicable statute of limitations does not commence to run against the plaintiff's cause of action until he learns, or by exercise of reasonable diligence should have learned, of the defect in the title.
>
> Ciccarello at 158, Syllabus by the Court.

A review of Judge Zakaib's order granting summary judgment in favor of Defendant McIntyre clearly reveals that the circuit court impermissibly resolved questions of fact that should have been resolved by a jury. Judge Zakaib made factual findings -- such as the finding that Defendant McIntyre's signing of the Final Order on September 24, 1990, was a "ministerial function and not a substantive one given Ms. Mullens appearance, the objections that she made, and her prosecution of those objections all the way to the Supreme Court of Appeals." See Appendix at page A2.

In Renner v. Asli, 280 S.E.2d 240 (W.Va. 1981), a medical malpractice case, the state Supreme Court stated that West Virginia follows the discovery rule in medical malpractice cases under which the cause of action does not accrue and the limitation period does not begin to run until the plaintiff knows, or in the exercise of reasonable diligence has reason to know, of the medical malpractice. Id. at 241 and 242. The Court continued as follows:

> The question of when the malpractice occurred and when the plaintiff became aware of the negligence **is a question of fact for the jury**. We affirmed that rule recently holding "[t]he question of when plaintiff knows or in the exercise of reasonable diligence has reason to know of medical malpractice is for the jury." Syl. pt. 1, Harrison v. Seltzer, W.Va., 268 S.E.2d 312 (1980), quoting, Syl. pt. 4, Hill v. Clarke, W.Va., 241 S.E.2d 572 (1978).
>
> Id. at 242. (emphasis added)

Therefore, Judge Zakaib's order clearly invaded the province of the jury when he found that there was "no question plaintiff either knew, or reasonably should have known, of defendant's alleged conduct prior to September 24, 1992. Hence, the statute of limitations bars this civil action." See Appendix, at page A2.

Moreover, in Childers Oil Co., Inc. v. Exxon Corp., 960 F.2d 1265 (4th Cir. 1992), the Fourth Circuit Court of Appeals provided that "**if** resolution of a statute of limitations defense presents a genuine question of material fact, a jury should resolve it. If not, a statute of limitations may be applied as a matter of law." Id. at 1273. Mrs. Murray presented genuine questions of material fact in her attempt to thwart summary judgment; therefore, applying Childers to the instant matter, summary judgment should have been denied.

It is egregious that summary judgment was granted in the matter herein even before Defendant McIntyre's deposition was taken.[2] Judge Zakaib's finding in his order that "plaintiff's mere factual denials do not sufficiently rebut the motion for summary judgment" is cavalier in view of the Renner and Childers decisions, supra.

With regard to the federal question presented herein, Petitioner Constance Murray asserts that the rulings of both the circuit court and the state Supreme Court violate the principles of due process. The essence of substantive due process is protection from arbitrary and unreasonable action. The Fourteenth Amendment of the United States Constitution provides a constitutional guarantee that no person shall be arbitrarily deprived of his life, liberty or property. In the instant matter, it is clear that the rulings below have deprived your petitioner of the opportunity to have her case considered by a jury and to seek financial recompense for the damages that she alleges have resulted from Defendant McIntyre's negligence.

West Virginia Rule of Civil Procedure 56 conditions the granting of summary judgment upon a showing that there is no issue of material fact, and that the moving party is entitled to prevail as a matter of law. See Dale P. Olson, Modern Civil Practice in West Virginia, The Michie Company, 1984, p. 432. Often discovery precedes the making of a motion for summary judgment and the Rule expressly contemplates the use of information obtained in discovery to amplify an understanding of the factual issues involved in the case. The motion for sum-

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[2] During Mrs. Murray's research for her pro se filing of appeals beginning in March, 1991, plaintiff learned that Defendant McIntyre failed to exert ordinary rules of discovery. After she obtained her file from Defendant McIntyre on June 25, 1991, she suspected that he had been negligent in the handling of her case. One of the items found in her file was the 1986 Temporary Order not filed but ordered to be entered by the divorce commissioner at the end of a January 29, 1986 hearing. Furthermore, Mrs. Murray was further enlightened as to McIntyre's negligence when she read the response brief prepared by her former husband's attorneys and dated March 4, 1991. Dr. Murray asserted that he should not be held accountable for the opposing attorney's failure to conduct adequate discovery and provides a list of Defendant McIntyre's failings in this regard.

mary judgment was granted herein prior to the taking of Defendant McIntyre's deposition.

A genuine issue of fact exists whenever there is a conflict as to the evidence of the case. The test is whether "the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party cannot prevail under any circumstances." Olson at p. 435, citing Hines v. Hoover, 192 S.E.2d 485, 489 (1972) and Hanks v. Beckley Newspaper Corp., 142 S.E.2d 727, 730 (1970).

CONCLUSION

Substantial fact issues existed in the instant matter as to when Constance Murray had reason to know of Defendant McIntyre's legal malpractice. Thus, it was reversible error for the circuit court to grant summary judgment in favor of the defendant, and for the Supreme Court of Appeals of West Virginia to refuse to consider Constance Murray's Petition for Appeal.

Petitioner Constance W. Murray respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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Petitioner, Pro Se
February 10, 1995

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 16th day of November, 1994, the following order was made and entered:

Constance W. Murray, Plaintiff
Below, petitioner

vs.) No. 940715

James B. McIntyre, McIntyre, Haviland
& Jordan, Defendants Below, Respondents

On a former day, to-wit, April 29, 1994, came the petitioner, Constance W. Murray, pro se, and presented to the Court her petition praying for an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 15th day of December, 1993, with the record therein accompanying the petition.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justice Workman deemed herself disqualified. Chief Justice Brotherton absent.

A True Copy

Attest: /s/Ancil G. Ramey
Clerk, Supreme Court of Appeals

IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

CONSTANCE W. MURRAY,
Plaintiff,

v. Civil Action No. 92-C-5337

JAMES B. MCINTYRE
MCINTYRE, HAVILAND & JORDAN,
Defendants.

ORDER

On the 17th day of November, 1993, came the parties, Constance W. Murray, Pro Se, and James B. McIntyre and McIntyre, Haviland & Jordan by and through their counsel, Jackson & Kelly and William J. Powell, upon defendants' motion for summary judgment.

Upon reviewing defendants' motion for summary judgment, memorandum in support thereof, and plaintiff's response memorandum in opposition, and upon hearing oral arguments of the parties, the Court finds the following facts and rules as follows:

1. The plaintiff retained the services of defendants in July of 1985 to represent plaintiff in a divorce proceeding. The attorney/client relationship existed up to December, 1989 or January, 1990, according to plaintiffs' own sworn deposition testimony. Plaintiff looked for new counsel until she obtained the services of Sharon Mullens in April of 1990 when Ms. Mullens entered her first appearance. Ms. Mullens was first granted permission to remove the divorce file at this time.

2. After the retention of Ms. Mullens, plaintiff exclusively relied upon Ms. Mullens for handling of the divorce litigation as her relationship with defendants terminated some

months before. Though Mr. McIntyre signed the Final Order on September 24, 1990, the Court finds that to have been a ministerial function and not a substantive one given Ms. Mullens appearance, the objections that she made, and her prosecution of those objections all the way to the Supreme Court of Appeals.

3. The Court does further find that the two year statute of limitations governs civil actions such as the one filed by plaintiff against the defendants herein. This civil action was filed on September 24, 1992. In order for the civil action to be time barred, plaintiff did know, or reasonably should have known, of the alleged acts of negligence performed by Mr. McIntyre by September 24, 1990. The nature of alleged acts of negligence and the actions or arguments of plaintiff, through her counsel, demonstrate her knowledge.

4. Upon a review of plaintiff's sworn deposition testimony and the facts developed in oral argument before the Court, the Court is of opinion that there is no question plaintiff either knew, or reasonably should have known, of defendants' alleged conduct prior to September 24, 1992. Hence, the statute of limitations bars this civil action.

WHEREFORE, for the reasons set forth herein, for such other reasons apparent on the record, and in defendants' memorandum of law, the Court does grant the defendants' motion for summary judgment and rules for the defendants as a matter of law. The Court finds plaintiffs mere factual denials do not sufficiently rebut the motion for summary judgment.

The Court notes the objection and exceptions of the plaintiff to its ruling.

Dated the 15th day of December, 1993.

ENTER:
/s/ Judge Paul Zakaib, Jr.

PRESENTED BY:

/s/ William J. Powell
JACKSON & KELLY
P.O. Box 553
Charleston, West Virginia 25322

INSPECTED BY:

_____
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